UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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ALL AMERICAN SCHOOL BUS CORP.,
et. al.,

Case Nos. 29-CA-100827 *et al.*

and

LOCAL 1181-1061, AMALGAMATED
TRANSIT UNION, AFL-CIO

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ANSWERING BRIEF OF CHARGING PARTY
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO
TO RESPONDENTS' EXCEPTIONS

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PRELIMINARY STATEMENT

Charging Party Local 1181-1061, Amalgamated Transit Union, AFL-CIO (hereinafter "Charging Party" or "Local 1181"), respectfully submits this answering brief to the Exceptions to the September 20, 2013 Decision of Administrative Law Judge Raymond Green ("the ALJ") submitted by Respondents ("the Employers"). For the reasons set forth in the ALJ's Decision, and for the additional reasons stated herein, the Employers violated the Act as the ALJ concluded and the Employers' Exceptions are without merit.[1]

The ALJ held that the Employers violated the Act by unlawfully declaring impasse and implementing their best and final offer ("BFO").[2] The Employers do not dispute that they declared impasse and implemented their BFO. The Employers' Exceptions and submissions in support thereof generally assert that Local 1181 and the Employers were deadlocked in their negotiations on the single issue of whether to adopt a most favored nations ("MFN") clause and that this was a critical issue that resulted in a breakdown in the overall negotiations.

By focusing exclusively on a single issue in negotiations – the MFN clause – the Employers can not meet their heavy burden of showing that the negotiating parties were at an impasse even if one accepts the Employers' position that the parties were deadlocked on the MFN clause (they were not). The existence of a deadlock on the MFN clause would not, in

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[1]Citations herein to the ALJ's Decision are to "ALJD". Citations to the transcript of proceedings in this case are to "Tr. __". Citations to exhibits are identified by party designation ("Jt.", "GC", "1181", or "Employers") followed by "Ex. __". Citations to the Brief in Support of the Respondents' Exceptions are to "Exceptions Br."

[2]On August 28, 2013, United States District Judge Kiyo A. Matsumoto, upon the record of this proceeding and briefs and oral argument, found that the Board showed reasonable cause to believe that the Employers committed an unfair labor practice and that injunctive relief is just and proper. Accordingly, Judge Matsumoto issued an injunction against the Employers pursuant to Section 10(j) of the Act. See Paulsen v. All American School Bus Corp., No. 13-CV-3762 (KAM), 2013 WL 4780043 (E.D.N.Y. Aug. 28, 2013).

itself, mean that there was no agreement to be had. The Employers still would have the heavy burden of showing that there was an overall impasse.

The Board need not even decide the status of the MFN issue because the record evidence, detailed herein, compels the finding that there was no impasse in the overall negotiations, which is the proper inquiry.

Even if the Board were to focus on the MFN clause issue, the ALJ correctly found that the MFN clause was not a "critical issue" and that there was no impasse in bargaining.[3] Although the ALJ did not explicitly so find, the record evidence shows that the negotiations did not break down over the MFN clause.

With respect to the overall negotiations, the Employers never warned Local 1181 that they believed the parties were approaching an overall impasse and complete breakdown of negotiations because of the MFN clause. The parties were making progress in negotiations, including on the day the Employers abruptly declared impasse, notwithstanding any alleged deadlock on the MFN clause. Indeed, on that day, after Local 1181 made counter-offers, at the caucus immediately preceding the Employers' distribution of their BFO, Local 1181 was working on more proposals to give the Employers. See Tr. 176. However, after only 12 bargaining sessions, only 5 of which occurred post-strike when the parties were able to make real progress, more time and good faith negotiations were required. Local 1181 believed that an overall agreement could be reached and proposed to continue bargaining, including with a mediator (as had benefited the parties in reaching agreements in the past, see Tr. 328).

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[3]The Employers contend that the ALJ "found that there was an actual impasse over the MFN." Exceptions Br. at 17. The ALJ's statement that the parties were "far apart," ALJD at 20:12-13, cited by the Employers, is not tantamount to a finding of an impasse.

Given the status of negotiations, including the possibility that agreement on such important open issues as wages, welfare, and pension would have made one or both parties more willing to reach an overall agreement, the parties were not at a point where further efforts to reach a collective bargaining agreement were futile or where the Employers were justified in walking away from the negotiating table as they did.

With respect to the proposed MFN clause, the parties were not deadlocked on the issue, the Employers cited the MFN clause as a mere pretext for declaring impasse before the due date of the "Easter adjustment" (a week's pay for work already performed due to be paid on March 22, 2013), and the MFN clause is not even in the Employers' interests. Sworn testimony and other evidence support the ALJ's finding that the proposed MFN clause was not a critical issue. See ALJD at 21:24-41. The parties spent less than an hour in total over the course of the entire negotiations discussing the MFN clause. Contrary to the Employers' assertions, almost all of the Employers told Local 1181's chief negotiator and other representatives that the MFN clause was not important to them. Moreover, in a May 14, 2012 letter to the president of Local 1181's parent union, the Employers' counsel set forth the Employers' need for concessions described therein but did not even mention an MFN clause (even though the existing clause was explicitly set to sunset at the expiration of the collective bargaining agreement ("the CBA")). See GC Ex. 3. The MFN clause was never invoked. Last, the MFN clause does not encompass every term and condition of employment. See GC Ex. 2 at 46. The Employers do not contend that the parties were deadlocked on the separate proposals relating to the subjects covered by the MFN clause or any other issue besides the MFN clause. These facts show that the Employers might ultimately agree to a collective bargaining agreement without the MFN clause, as they had done for decades and as they and their related companies do with other unions in collective bargaining

agreements covering the same work and classifications of workers, or with a compromise on the MFN clause.

The ALJ correctly found that it was very improbable that the proposed MFN clause would benefit the Employers (except, we submit, to the extent they seek to weaken and ultimately destroy Local 1181 – the largest union representing employees performing New York City Department of Education ("DOE") K-12 school bus work). The proposed MFN clause would discourage Local 1181 from organizing the employees of new companies or existing companies that have unrepresented employees. Local 1181 would not enter an agreement with a company if, by agreeing to lesser terms with a company, Local 1181 would trigger an MFN clause and automatically cause the wages and/or benefits of thousands of existing Local 1181 members to be reduced.

The proposed MFN clause would also harm the Employers because they benefit when Local 1181 organizes and obtains fair contracts with new companies or existing companies that have unrepresented employees. As explained more herein, see infra pp. 27-28, if Local 1181 does not organize those companies' employees because of the MFN clause, those companies are more likely to operate without a union and, in any event, to employ workers at terms and conditions that undermine the standards Local 1181 negotiated over decades and, thus, more likely to compete successfully with the Employers.

Sworn testimony and bargaining notes also show that Local 1181 repeatedly offered to extend the expired CBA including the MFN clause. This testimony, these notes, and other facts discussed herein show that Local 1181 might ultimately agree to a new collective bargaining agreement with the MFN clause, as Local 1181 did in 2009-2010 negotiations, or with a compromise on the MFN clause. Indeed, Local 1181 agreed to an MFN clause relating to

Welfare and Pension Plan contributions with Reliant (one of the largest employers) on February 20, 2013. See CP Ex. 5 ¶4.

The real reason that the Employers declared impasse on March 19, 2013 was to avoid paying their employees the "Easter adjustment", as well as the other elements of employee compensation the Employers unilaterally cut. Statements made at various points during negotiations by Domenic Gatto, the CEO of the largest Employer and the most frequent speaker among the Employers at negotiations, show that the Employers knew they would terminate negotiations before the Easter adjustment was due regardless of the status of negotiations. Moreover, the Employers proposed several bargaining dates for March, all prior to, and none after, the due date of the Easter adjustment.

The Employers' brief in support of their Exceptions contains many inaccurate and unsupported fact statements. The more one reviews the transcript and the exhibits cited, the more apparent it is that the Employers' statements are unsupported and self-serving rhetoric. For example, the Employers' mantra that Local 1181 made clear that it would never agree to the proposed MFN clause becomes no more accurate or persuasive by its frequent repetition. The Employers use the word "never" far more in their brief than Local 1181 used it in negotiations. Scrutiny of the Employers' selected cites to the hearing transcript and bargaining notes reveals that they do not support the Employers' assertions about how frequently in negotiations Local 1181 expressed something more than disagreement with the Employers' proposed MFN clause. Review of the record refutes the Employers' false narrative that Local 1181's position on the MFN clause was permanently immovable. In any event, the arguments in the Employers' brief are without merit.

FACTS

Local 1181 is a labor union with approximately 15,000 members. See ALJD at 3 n.3.

The Employers are private corporations that perform school bus transportation work pursuant to contracts with the DOE. See ALJD at 3:18-19; Tr. 79:10-22; Resps. Ex. 5 ¶2.

As of the time of the events in issue, Local 1181 represented for purposes of collective bargaining more than 8,000 drivers, matrons/escorts, and mechanics employed by the Employers and who are responsible for the transportation of children to and from school every day. See ALJD at 3:23-24; Tr. 83:7-9, 273:5-7, 438:9-14.

Michael Cordiello is the President of Local 1181 and Local 1181's chief negotiator. See ALJD at 7:39; Tr. 78:10-15, 80:10-12, 195:21 to 196:2.

Local 1181 has had collective bargaining agreements with many of the Employers for more than thirty years. See Tr. 80:23 to 81:3. The most recent collective bargaining agreements between Local 1181 and each of the Employers ("the CBA") expired on December 31, 2012. See ALJD at 4:26-27; Cplt. ¶7; Ans. ¶7.[4]

Negotiations for a successor agreement began on October 23, 2012. See ALJD at 7:38; Cplt. ¶11(a); Ans. ¶11(a). However, the parties only started making real progress, exchanging proposals and counter-proposals, discussing the many issues, and meaningfully narrowing their

[4]There is no cognizable support in the record for the Employers' assertion that the Local 1181 CBA has historically provided for the highest wages and benefits for school bus company drivers and escorts in the country. Compare Exceptions Br. at 6 and ALJD at 4:24-25, 48-49. For example, employees represented by Local 91 performing the same DOE K-12 work receive a higher wage rate when they get to the top rate in their CBA. See Tr. 1630:4 to 1631:24 (Gigliotti).

differences, after a strike ended in mid-February. See Tr. 118:19 to 119:1, 169:11-14, 182:14-16; Resps. Ex. 5 ¶¶9, 15.[5]

As of March 19, 2013, after only five post-strike bargaining sessions, more time and good faith negotiations were needed to reach an agreement. Issues were narrowed and some were resolved, including that day, but many issues were unresolved. See Tr. 168:12-16, 172:4 to 176:14; GC Exs. 9, 19, 20. Some Local 1181 information requests were outstanding. In fact, at this session, after the Employers declared impasse, the Employers turned over a one-page document containing some information Local 1181 had requested about the costing of the Employers' proposals. See Tr. 181:13-17, 1268; Resps. Ex. 5 ¶30; Resps. Ex. 3 (last page of exhibit). At the time the Employers declared impasse, Local 1181's auditor had completed three reviews of certain financial documents a handful of Employers permitted Local 1181 to look at to determine if the Employers needed the concessions they were demanding. Local 1181 first met with its auditor to discuss the reviews on March 11 and 12, only a week before the Employers declared impasse. See Tr. 155:15 to 156:11, 164:1-17.

On March 19, 2013, Cordiello started the session by asking for more negotiating dates and urging the Employers to pay the Easter adjustment (a week's pay for work already performed due to be paid on March 22, 2013) because of a rumor that the Employers would not pay it. See Tr. 168:12 to 170:14; Resps. Ex. 5 ¶27. Cordiello also said he was confident, in light

[5]The Employers' assertion that the 2013 strike was directed solely at DOE and not at the Employers (see Exceptions Br. at 11) was rejected when the NLRB dismissed a charge the Employers filed. See Tr. at 1652:25 to 1653:4; Amalgamated Transit Union, Local 1181-1061 (All American School Bus Co.), Case No. 29-CC-096453 (Feb. 1, 2013 letter dismissing unfair labor practice charge Employers filed based on this allegation and March 19, 2013 letter denying Employers' appeal of dismissal of charge); see also Resps. Ex. 8.

of the progress made, that the parties could reach an agreement. See Tr. 172.[6] The parties made progress on several issues. See Tr. 169, 172:4 to 176:14.

After a caucus in which Local 1181 was working on more proposals to give the Employers, see Tr. 176, notwithstanding the progress the parties were making, the Employers suddenly gave Local 1181 their best and final offer ("BFO") (which was typed prior to the start of the bargaining session), canceled the remaining scheduled bargaining session, declared that the parties were at impasse, and walked away from the bargaining table. See Cplt. ¶11(b-c); Ans. ¶11(b-c); Tr. 1246-47.

On March 22, 2013, the Employers began implementing their BFO, including drastic wage cuts for their already low-wage employees. See Cplt. ¶12(a); Ans. ¶12(a). The BFO included, among other terms, a 7.5% wage cut for drivers, a 3.75% wage cut for escorts, elimination of the Easter and Christmas adjustments, elimination of the "wage accrual" (between one and five weeks' pay for work already performed by employees with certain years of service that was otherwise due to be paid on June 15, 2013), elimination of additional pay for employees who work on days when schools are closed, and elimination of daily overtime. See GC Ex. 20.

The Employers saved (and the employees collectively lost) $8-$10 million by not paying the Easter adjustment alone. See Tr. 193:12-18; Resps. Ex. 5 ¶33.

The Employers asserted that the parties were at impasse solely because Local 1181 had not agreed to the Employers' proposed MFN clause. See ALJD at 19:5-7; Tr. 179:11-15, 511:1-11, 1103:19-1104:5, 1211:22-1212:1, 21-24.

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[6]The Employers provide no record support for their assertion that Cordiello recognized that it is a very real possibility that all Employers might be out of business by or before 2015. See Exceptions Br. at 10.

As explained above, the proposed MFN clause does not encompass every term and condition of employment; it covers only five subjects: wages, health insurance coverage, pension, wage accruals, and the ten hour daily spread (overtime). See ALJD at 4-5; GC Ex. 2 at 46. The Employers did not contend that the parties were deadlocked on the separate proposals relating to the subjects covered by the MFN clause or any other issue besides the MFN clause.

Over twelve bargaining sessions, the parties spent less than an hour in total discussing the proposed MFN clause. See Tr. 180:25 to 181:3; Resps. Ex. 5 ¶31; Tr. 513:6-13.

Away from the bargaining table, before the Employers declared impasse, all the representatives of the individual Employers except two or three told Local 1181 representatives that the proposed MFN clause was not important to their companies. Local 1181 representatives' testimony on this subject is unrebutted except for one Employer representative who did not recall stating that the MFN clause was not important. See infra pp. 22-23.

Prior to the Employers walking away from the bargaining table, Local 1181 disputed the Employers' assertion that the parties were at impasse. Local 1181 offered to continue bargaining with any Employer. No Employer agreed. See Tr. 180:5-15, 1264-65; Resps. Ex. 5 ¶29.

ARGUMENT

I. THE ALJ CORRECTLY HELD THAT THE EMPLOYERS VIOLATED THE ACT BY DECLARING IMPASSE AND IMPLEMENTING THEIR BFO.[7]

A. Legal Standards

The ALJ set forth correct legal standards in determining that the Employers unlawfully declared impasse and implemented their BFO. See ALJD at 19-20.

[7]Local 1181 reserves the right to contend that the Employers waived their arguments, previously asserted, among other times, in a pre-hearing motion for summary judgment that the ALJ denied, based on the lack of a quorum of the NLRB and the alleged invalid appointment of Regional Director Paulsen by failing to file an exception(s) on these subjects.

Impasse occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enf'd, 395 F.2d 622 (D.C. Cir. 1968).

The existence of an impasse is a question of fact. See Omaha World-Herald, 357 NLRB No. 156, slip op. at 26 (2011) (citing Taft Broadcasting, 163 NLRB at 478).

The burden of demonstrating that an impasse exists rests with the party asserting the impasse. See Area Trade Bindery Co., 352 NLRB 172, 176 (2008); CJC Holdings, Inc., 320 NLRB 1041, 1044 (1996), enf'd, 110 F.3d 794 (5th Cir. 1997); Outboard Marine Corp., 307 NLRB 1333, 1363 (1992). This burden is relatively heavy. See Powell Elec. Mfg. Co., 287 NLRB 969, 973 (1987), enf'd as modified, 906 F. 2d 1007 (5th Cir. 1990).

Impasse exists only when it is clear that further negotiations would be futile; "'[*b*]*oth* parties must believe that they are at the end of their rope.'" See Newcor Bay City Div. of Newcor, Inc., 345 NLRB 1229, 1238 (2005) (quoting AMF Bowling Co., 314 NLRB 969, 978 (1994), enf. denied, 63 F.3d 1293 (4th Cir. 1995) (quoting PRC Recording Co., 280 NLRB 615, 635 (1986), enf'd, 836 F.2d 289 (7th Cir. 1987))), enf'd, 219 Fed. Appx. 390 (6th Cir. 2007) (emphasis supplied). Thus, in Newcor, because union officials were ready and willing to negotiate further compromises, even though the employer's representative

> was impatient with the Union's pace in agreeing to concessions, his frustration [was] not the equivalent of a valid impasse, nor did it mean that a negotiated settlement was not within reach. [citations omitted] The Respondent's "feelings that the Union should have realized the seriousness and immediacy of its financial condition is immaterial and the Union cannot be made responsible for the resulting events because it was skeptical of the Employer's claims and therefore was slow to respond to or failed to immediately capitulate to Respondent's terms."

Newcor, 345 NLRB at 1238 (quoting Page Litho, Inc., 311 NLRB 881, 889 (1993), enf'd in part, 65 F.3d 169 (6th Cir. 1995)).[8]

Impasse is decided based upon the totality of the circumstances. See Grinnell Fire Protection Sys. Co., 328 NLRB 585, 585 (1999), enf'd, 236 F.3d 187 (4th Cir. 2000), cert. denied, 534 U.S. 818 (2001). In Taft Broadcasting Co., the Board set forth certain factors to be considered in making the determination of whether parties are at impasse, including bargaining history, good faith of the parties in negotiations, the length of the negotiations, the importance of the issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. See Taft Broadcasting, 163 NLRB at 478.

Impasse on one or several issues does not suspend the obligation to bargain on remaining issues. See Visiting Nurse Servs. v. NLRB, 177 F.3d 52, 57 (1st Cir. 1999), enf'g, 325 NLRB 1125 (1998); Bottom Line Enters., 302 NLRB 373, 374 (1991), enf'd, 15 F.3d 1087 (9th Cir. 1994).

Thus, "the Board has long distinguished between an impasse on a single issue that would not ordinarily suspend the duty to bargain on other issues and the situation in which impasse on a single or critical issue creates a complete breakdown in the entire negotiations." Sierra

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[8]Although the Employers did not set contract expiration as a deadline to reach an agreement as the employer in Newcor did, see 345 NLRB at 1239, the Employers did set for themselves a mid-March deadline which they intended to adhere to, and ultimately unlawfully did adhere to, regardless of the state of negotiations. See infra pp. 24-25. The cases the Employers cite in footnote 25 of their brief do not support the Employers' suggestion that the unilateral establishment of a deadline for negotiations regardless of the state of negotiations is permissible. In Detroit Typographical Union No. 18 v. NLRB, 216 F.3d 109 (D.C. Cir. 2000), no one challenged the employer's deadline and the Court, therefore, did not say it was acceptable or unacceptable. The remaining cases show that whether setting a deadline constitutes a failure to bargain in good faith depends on the circumstances.

Another factor in Newcor, also present here, was that the employer did not avail itself of a mediator's help to reach an agreement – something the parties had done in the past. See Newcor, 345 NLRB at 1239.

Publishing Co., 291 NLRB 552, 554 (1988) (footnotes omitted), enf'd, 888 F.2d 1394 (9th Cir. 1989).

Under Board law, a party asserting an overall impasse based on a single issue, like the Employers in this case, must show:

> first, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.

CalMat Co., 331 NLRB 1084, 1097 (2000).

In Sierra Publishing, the Board reversed an ALJ's finding that the parties reached impasse over the single issue of union security. The Board relied on the fact that the parties only briefly discussed the issue at six of 17 sessions, that neither party attempted to schedule bargaining only on this issue, that the issue had not been fully bargained over when the employer suddenly announced that it believed the parties were at impasse and would be implementing its final offer, and that both parties did not believe they were at impasse. See Sierra Publishing, 291 NLRB at 554-56. The Board also specifically noted that "neither side communicated to the other that one party's failure to achieve a desired degree of concession on [Guild security] would necessarily deadlock the entire bargaining process." Id. at 556 (internal citations and quotations omitted).

Here, the Employers ask the Board to take the unprecedented step of concluding that there was an overall impasse because of a demand for an MFN clause. An MFN clause is not the type of overriding issue that can cause an overall impasse. We have not identified a single Board case, and the Employers have not identified a single Board case, where a party's demand for an

MFN clause was the single issue that was so important that it caused, or could cause, such an impasse.

There are good reasons for the Board to limit the circumstances in which the Board finds that single issues cause overall impasses. There are always sticking points in negotiations. A ruling for the Employers here will encourage other employers to adopt a rigid posture on at least one issue in negotiations so they can claim, if desired, to be at impasse – an ace in the hole so to speak - contrary to the Act's purpose of promoting agreements through good faith bargaining.

New NGC, Inc., 359 NLRB No. 116 (2013), cited by the Employers, is distinguishable. As United Stated District Judge Matsumoto noted in granting the Board's request for injunctive relief against the Employers, unlike in New NGC, here the record shows little discussion over the MFN clause and that the union was not "unambiguously opposed" to the MFN clause. See Paulsen v. All American School Bus Corp., No. 13-CV-3762 (KAM), 2013 WL 4780043, at *25-26 (E.D.N.Y. Aug. 28, 2013). Judge Matsumoto concluded that the record suggested "there was leeway for the parties to continue negotiations, including over the MFN clause, up to the time the respondents declared impasse. This is an important distinction from the union's position in *New NGC*." Id. at *26.[9]

[9]The Employers also rely primarily on select decisions of the Court of Appeals for the District of Columbia Circuit that set aside Board decisions finding that parties were not at impasse. See Laurel Bay Health & Rehab. Ctr. v. NLRB, 666 F.3d 1365 (D.C. Cir. 2012), granting review in part, 356 NLRB 232 (2008); Erie Brush & Mfg. Corp. v. NLRB, 700 F.3d 17 (D.C. Cir. 2012), granting review, 357 NLRB No. 46 (2011); TruServ Corp. v. NLRB, 254 F.3d 1105 (D.C. Cir. 2011), granting review in part, 331 NLRB 787 (2000). We respectfully submit that, to any extent these cases may be pertinent, the Board should follow its own precedent based on its expertise in applying the Taft factors and advancing the policy of the Act. The ALJ indicated that he was aware of these cases, see ALJD at 19 n.20, and correctly concluded that the Employers had not met their burden under Board law of establishing that the parties were at impasse over the single issue of the MFN clause.

Applying these principles, the ALJ correctly held that the Employers unlawfully declared impasse and implemented their best and final offer because the proposed MFN clause was not a critical issue to the Employers. See ALJD at 21:37-39. Contrary to the Employers' assertion, the ALJ did not find that the negotiating parties were deadlocked on the single issue of the MFN clause (they were not). See id. at 21:28-41. The ALJ did not explicitly find that the negotiations did not break down over the MFN clause, but the evidence shows that the MFN issue did not impact the overall negotiations as evidenced by the parties' progress on important issues such as wages and benefits, and other issues. In any event, the Employers failed to meet their burden of showing that the parties were at an *overall* impasse in negotiations, as required by Board law. The parties were not deadlocked on any other issue and there was no breakdown in the overall negotiations other than that the Employers walked away from the bargaining table.

B. The Employers Unlawfully Declared Impasse and Implemented Their BFO

The record amply demonstrates that the bargaining parties were not at an overall impasse, and were not even deadlocked on the proposed MFN clause. The following are several of the reasons why the parties were not at an overall impasse:[10]

1) The Employers never said that the parties were approaching impasse prior to the Employers declaring impasse. See Tr. 179, 513, 1240-41; Resps. Ex. 5 ¶28. The Board cited the

[10]The Employers' attempt to expand the scope of the basis for impasse at pages 13-14 of their brief must fail. The Employers based their assertion that the parties were at impasse exclusively upon the fact that Local 1181 did not agree to the Employers' proposed MFN clause. See supra p. 8; ALJD at 19:5-7. There is no record evidence that the Employers cited any other basis for declaring impasse.

Similarly, the Board should reject any attempt by the Employers to litigate whether the Employers' or Local 1181's overall conduct or position in bargaining was more reasonable. The Complaint does not call for evaluation of the merits of the parties' bargaining positions. Even if the Employers had been eminently reasonable until they declared impasse, that would not be a defense to the charge that the Employers unlawfully declared impasse.

absence of such a warning as a pertinent factor in Sierra Publishing and Newcor. See Sierra Publishing, 291 NLRB at 556; Newcor, 345 NLRB at 1239.[11]

2) The Employers declared impasse on March 19, 2013, only the 12th bargaining session and only the 5th session after the strike. See Tr. 170, 179. The prior negotiations ran for more than 20 bargaining sessions. See Tr. 577-78.[12]

3) The parties made significant progress in negotiations once the strike ended, including on the day the Employers declared impasse. See Tr. 159-62, 166-68 (March 12); Tr. 172, 172-76, 180-83 (March 19 and in general). This progress included movement by Local 1181 on issues that Local 1181 had initially flatly rejected. See Tr. 115-16 (at January 8 session, Local 1181 rejected Employers' proposals on medical givebacks and loss of work/layoffs); Tr. 122 (at February 5 session, Local 1181 rejected Employers' proposal on pro rata funds contributions during the strike); Tr. 159-60 (at March 12 session, Local 1181 made a proposal on pro rata funds contributions during the strike, proposed a one month moratorium on welfare fund contributions, and stated it would review part of the Employers' loss of work/layoffs proposal). Cordiello indicated a willingness to continue to move towards the Employers' positions. See Tr. 180-83, 527.

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[11]The parties' disagreement on the MFN clause issue would not cause Local 1181 to believe that the parties were approaching an overall impasse.

[12]Contrary to the Employers' assertion at page 6, footnote 3, in their Exceptions brief, the ALJ did not exclude all evidence pertaining to 2009 negotiations. The ALJ stated that testimony regarding the 2009 negotiations was not relevant insofar as it related to the negotiation of the MFN clause adopted in those negotiations. See Tr. 312-13. Even on this subject, the ALJ later permitted limited questioning on whether Cordiello expressed unwillingness to agree to the MFN clause in 2009. See Tr. 1362. In any event, the Employers can not complain about the testimony at pages 577-78 of the transcript because such testimony was in response to questions on the Employers' cross-examination of Richard Gilberg (Local 1181's counsel). The Employers' Exceptions do not contest the ALJ's rulings with respect to 2009 negotiations.

4) The Employers declared impasse without attempting mediation, which Cordiello proposed when the Employers declared impasse. See Tr. 180.[13]

5) Local 1181 asked to "see the books" of any Employer that wanted concessions. Contrary to the Employers' assertion that "several of them voluntarily opened their books to [Local 1181's] auditors[,]" see Exceptions Br. at 11 n.5, only a small number of the 28 Employers offered to provide certain limited documents for review by the auditors retained by Local 1181 (and also by its associated benefit funds, which are overseen by an equal number of union and employer trustees), and only after the parties signed confidentiality agreements. See ALJD at 8 n.12.[14] The first confidentiality agreements (Employers Reliant, Gotham, and Mountainside) were not signed until February 26, 2013. See Tr. 505-06. Others were signed at the March 5, 2013 (Atlantic companies) and March 11, 2013 (Boro/Lonero) bargaining sessions. See Tr. 507, 508. Preliminary results of the reviews of the records provided by the Atlantic companies, Reliant, and Gotham were discussed by the auditor with Local 1181's bargaining committee on March 11 and March 12, 2013. See ALJD at 8 n.12; Tr. 153-55. When the Employers declared impasse just a week later, Local 1181 had not had adequate time to formulate positions or proposals based on the limited reviews. See Tr. 171-72, 511. The limited reviews the Employers permitted Local 1181 to conduct showed mixed results. Local 1181 knew that Reliant would show losses because Reliant was new to the industry and had unique

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[13]That Local 1181 previously declined mediation is immaterial because, as Cordiello explained, the parties were not then at the point where mediation was needed. See Tr. 328. The Employers declined mediation because, as discussed herein, see infra pp. 24-25, they believed they achieved their object of reaching impasse so they could implement their BFO and avoid paying the Easter adjustment, as well as the other elements of employee compensation the Employers unilaterally cut, an object that is contrary to the policy of the Act.

[14]The Employers' record cites do not support their assertion that this was the only time that Employers opened their books in over thirty-five years of bargaining. See Exceptions Br. at 11 n.5.

start-up costs, incurred losses because of Hurricane Sandy and the strike, and entered the industry essentially by purchasing a bankrupt company; Gotham was making a profit. See Tr. 337-38, 343-45.

6) After the strike ended in mid-February, Local 1181 submitted written requests for information to the Employers in letters dated February 28, 2013 and March 12, 2013. See GC Exs. 14, 17. On March 19, 2013, when the Employers declared impasse, much of the information and backup data substantiating the Employers' assertions still had not been produced. The Employers did not provide information in response to Local 1181's March 12, 2013 information request until Jeffrey Pollack, the Employers' chief negotiator, handed over a one page "summary" document after the Employers declared impasse. See Tr. 181, 1268.

The Employers ignored some items of Local 1181's requests, including, among others: the total daily overtime hours and dollars paid over the last year; financial statements including profit and loss statements for each yard of the Employers for the last five years; the total dollars paid for employees who worked on a snow day over the last year; and the total welfare and pension contributions and benefits hours paid in the last year for employees who were on workers' compensation or disability. See Resps. Ex. 3.

To the extent the Employers responded to Local 1181's requests, the responses were incomplete and untimely. For example, in response to Local 1181's request for the Employers' costing of their proposals, the Employers' one page "summary" document did not respond to Local 1181's requests for, among other information: the number of regular and shape drivers and escorts and shop employees (and for each group, for the last year: (1) the number at each step of the wage scale; (2) the total number of hours worked; and (3) the total wages paid); the number of regular and shape drivers and escorts eligible for wage accrual payments (and for each group:

(1) the number at each level of accrual pay and (2) the total dollars paid); and the number of regular and shape drivers, escorts, and shop employees eligible for payment of adjustment weeks (and for each group, (1) the number at each step of the wage scale and (2) the total wage adjustments paid). See Resps. Ex. 3 (the "summary" is the last page of the Exhibit).

Local 1181's information requests were critical to Local 1181's ability to engage in productive negotiations, to better understand the savings the Employers' proposals might achieve for the Employers, and to represent its members effectively. The requests were directly related to the Employers' demands. Had the Employers' furnished the requested information and/or done so in a timely manner, Local 1181 could have assessed, based on facts rather than negotiations rhetoric, the basis for the Employers' proposals and modified its own proposals accordingly. More information, timely produced, would have assisted Local 1181 to address the Employers' actual, as opposed to asserted, needs. See Harbor View Health Care Ctr., No. 22-CA-28151, at 38 (Mar. 10, 2010) (Landow, ALJ) ("[H]ad the information sought by the union been provided in a timely fashion, it is reasonable to infer that it could have been used to determine strategy and tactics in the negotiations"), adopted without exceptions (Sept. 17, 2010).

"A legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations." Decker Coal Co., 301 NLRB 729, 740 (1991); Newcor, 345 NLRB at 1241; Castle Hill Health Care Ctr., 355 NLRB No. 196, at 56 (2010). "Similarly, information that is not produced in a timely manner may also prevent parties from reaching a lawful impasse." Harbor View Health Care Ctr., No. 22-CA-28151, at 46.

Also, the Employers were obligated to give Local 1181 enough time to review and analyze the requested information before the Employers declared impasse. See Royal Motor

Sales, 329 NLRB 760, 773-74 (1999), enf'd, 2 Fed. Appx. 1 (D.C. Cir. 2001); Dependable Bldg. Maint. Co., 274 NLRB 216, 216, 219 (1985).

7) Local 1181 offered to negotiate separately with any Employer wishing to do so, including with Reliant and Atlantic, the only two companies that the limited financial reviews indicated might be losing some money, and with all the Employers after they declared impasse. See Tr. 180, 1264-65, 1331-32; CP Ex. 5. No Employer accepted Local 1181's offers.

8) The MFN clause was not a central issue. It was one of many open issues at the time the Employers declared impasse. In contrast to the sparse discussion of the proposed MFN clause, discussed herein, many other items were frequently discussed at length, as reflected in various bargaining notes. See GC Exs. 9 (Cordiello), 19 (Pollack); Resps. Exs. 12 (Gilberg), 23 (Jemmott).

The following are several of the reasons why the parties were not deadlocked on the MFN clause:

1) The MFN clause was barely mentioned in negotiations. The Employers did not dispute the testimony of Cordiello and Gilberg that the total amount of time spent discussing the MFN clause throughout the negotiations (including on March 19) was less than one hour. See Tr. 180-81, 513.

2) The MFN clause was generally mentioned at the bargaining table when one party or the other would review the list of open issues. Those instances took seconds and there was generally no follow up discussion. See, e.g., Tr. 114-17, 128, 130-37, 148, 510.

3) On the infrequent occasions when the MFN clause was discussed at the table beyond noting the status of the Employers' proposal, those discussions were short. On some of those occasions, Local 1181 offered an agreement including the MFN clause. For example, on

November 20, 2012, the second bargaining session, Cordiello proposed that the parties "roll over" (extend) the CBA for a year given the uncertainty facing the parties with respect to, among other things, possible bidding of contracts by DOE and the proposed terms of bid contracts. See ALJD at 8:7-10; Tr. 103-04, 504, 522, 544. Richard Milman, one of the Employers' attorneys, asked if that proposal included the MFN clause and Cordiello responded that it did. See Tr. 456; see also ALJD at 8:7-10; Tr. 549-50 (Employers asked if proposal included MFN and Cordiello said that it did); Exhibit A to this brief (excerpts from Gilberg's and Employer representative Mancuso's notes (Resps. Ex. 12 at 6; GC Ex. 24 at 9)).[15] The Employers rejected that proposal. See Tr. 103-04.

On February 26, 2013, the first bargaining session after the strike, Cordiello offered to extend the contract suggesting a shorter CBA until a new mayor was in office, with some additional savings for the Employers, once again referring to the uncertain environment. See Tr. 592. This made sense in light of the letter the leading mayoral candidates signed the day before Local 1181 called an end to the strike in which the candidates pledged, if elected, to revisit the DOE contracts to insure that the job security, wages, and benefits of drivers and escorts are protected. See ALJD at 11:17-24; CP Ex. 1. The Employers rejected this proposal. See Tr. 506-07, 592.

On March 4, 2013, in an email to Pollack, Gilberg suggested that the Employers take a serious look at Local 1181's proposal to extend the current agreement for 15 months or so when the parties would have more certainty. See Resps. Ex. 3 (page 4 of Exhibit). Pollack and the Employers did not respond.

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[15]For the convenience of the reader of the record, we drew a border around the pertinent portions of these notes and, on Gilberg's notes, we printed more legibly the text of the notes above each handwritten line in accordance with Gilberg's testimony reading his notes into the record at page 549 of the transcript.

At the March negotiating sessions, Local 1181 suggested more than once, at the bargaining table or in discussions between Gilberg and Pollack, that the parties roll over the CBA for 18 months for Employers with DOE contracts expiring June 2014 and for 30 months for Employers with DOE contracts expiring June 2015. In at least one conversation between Gilberg and Pollack in March 2013, Local 1181 again made explicit that this would include the MFN clause; in any event, extending the contract would include the MFN clause. See Tr. 508-09, 522, 524-25, 545, 561-62, 1152, 1291-92. A rolled over CBA could include "tweaks" (savings for the Employers). See Tr. 524-25, 561-62. The Employers continued to reject all such proposals. See Tr. 509. On at least one occasion, Pollack indicated that the Employers were not interested because they needed cuts. See Tr. 522-23.

In addition to Local 1181's offers to roll over the CBA including the MFN, Cordiello suggested at the January 8, 2013 bargaining session that the parties consider an "alternative" to the MFN and Joseph Curcio (representing Respondents Boro and Lonero) raised the idea of a committee. See Tr. 1545, 1548-50; GC Ex. 24 at 7 (Mancuso); see also Resps. Ex. 22 at 2 (Strahl) (Cordiello said "If the [Employee Protection Provisions ("EPP") are] preserved we may be able to put some parameters on the most favored nations.").[16]

Moreover, as part of a written February 20, 2013 strike settlement agreement between Local 1181 and Reliant, one of the largest Employers, Local 1181 agreed to an MFN clause relating to Welfare and Pension Plan contributions. See ALJD at 11:29-38; CP Ex. 5 ¶4.

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[16]The Employers have contended that Cordiello's January 8, 2013 suggestion was not important because it was tied to preservation of the EPPs. In addition to showing that Local 1181's position was not intransigent, the EPPs remain in certain companies' contracts with DOE through June 2014 and June 2015, DOE extended certain companies' contracts to June 2015 with the EPPs, and the next mayor may restore the EPPs to all contracts. See Tr. 243-44, 485-86, 506, 526. The EPPs do not benefit only Local 1181 members, but apply to school bus drivers and escorts performing DOE K-12 work regardless of whether they are represented by Local 1181, another union, or no union at all. See Tr. 1114; Jt. Ex. 1.

4) Almost all the representatives of the individual Employers except two or three told Cordiello and/or Local 1181 Executive Board and bargaining committee members James Hedge, Ed Gigliotti, and Vincent Catalano prior to the declaration of impasse that the proposed MFN clause was not important to them. The testimony of Cordiello and the other Local 1181 representatives on this subject is almost entirely unrebutted. Cordiello had conversations over the phone, in his office, and away from the table at bargaining sessions with all the Employer representatives except two or three who told him this during negotiations and after the declaration of impasse, including, but not limited to: Adem Adem and Robert Carter Pate from Reliant; Ray Fouche from Rainbow, All American, Citywide, and Cifra; Agostino Vona from Kings and Quality; Curcio from Boro, Lonero, and ANJ; Joseph Termini, Jr. from Hoyt; Joe Sabatelli from Gotham and IC Escorts; and Michael Tornabe from Logan, Bobby's, Grandpa's, and Lorissa. See ALJD at 8:13-19; Tr. 221:14-19, 222:8-12, 222:24 to 223:3, 410:20 to 413:6 (Pate and Adem); Tr. 413:23 to 414:14 (Fouche); Tr. 414:21 to 415:7 (Vona); Tr. 385:5-16, 415:22 to 416:1 (Curcio); Tr. 416:2-15 (Termini); Tr. 416:21 to 417:2 (Sabatelli); Tr. 418:3-11 (Tornabe).

Local 1181 Executive Board and bargaining committee members had similar conversations with Employer representatives. Hedge had multiple conversations with Termini (Hoyt) about the MFN clause; Termini told him that it was not a concern of his and that other economic issues were more important. See ALJD at 8:19-21; Tr. 1612:10-17, 1616:1-4. Gigliotti testified that Tornabe (Logan companies) stated in Cordiello's office between December and the first week of January, in Gigliotti's presence, that the MFN clause was not too important to him and that he did not care about it. See Tr. 1626:19 to 1627:3, 1633:1-2, 1635:18-22. Last, Adem (Reliant) told Catalano that he was not interested at all in the MFN

clause and that if there was no MFN clause he could make his own deal and get relief for his company. See Tr. 1647:21 to 1648:2.

Only Termini testified in response for the Employers. Termini did not recall having a specific conversation regarding the MFN clause with Cordiello or anyone. See Tr. 1594:3-8, 1597:19-1598:11.

In sum, that the proposed MFN clause was not important for almost all Employers shows that it was not critical and strongly suggests the possibility of ultimate compromise.

5) Local 1181 agreed to the MFN clause in the prior negotiations.

6) In May 2012, Milman, with input from Pollack after Pollack conferred with his clients, wrote a letter to the president of Local 1181's parent union in Washington (rather than to Local 1181) on behalf of the Employers. The letter identified concessions the Employers would seek in negotiations, without mentioning the MFN clause although it was explicitly set to sunset at the expiration of the CBA. This shows that the issues mentioned in the letter were important and the MFN clause was not important. See ALJD at 6:45-46; GC Ex. 3; Tr. 941-43.

7) The proposed MFN clause is not common in the industry and was never invoked. The Employers operated for decades before an MFN clause was added to the CBA in 2009 and that MFN clause was never invoked. See Tr. 1237. One Employer – Reliant - has a collective bargaining agreement with another union covering the same classifications of employees performing DOE K-12 school bus work. See Tr. 207. Many Employers have related companies performing DOE K-12 school bus work that have collective bargaining agreements with other unions covering the same classifications of employees. See Tr. 201-02, 1421-26. Reliant's and the other companies' collective bargaining agreements with other unions do not include MFN clauses. See Tr. 207-08, 1421-26.

In sum, the points above show that there was no overall impasse or breakdown in overall negotiatons, the MFN clause was not a critical issue, and that there was not even a deadlock on the MFN clause.

C. The Employers Declared Impasse to Frustrate the Bargaining Process

"[T]he assertion of an impasse must be made in good faith and not be merely designed to frustrate the bargaining process." Outboard Marine Corp., 307 NLRB at 1363.

Here, the Employers' articulated reason for declaring impasse was a mere pretext. The Employers planned to declare impasse and implement their BFO prior to March 22, 2013, the due date of the Easter adjustment, regardless of the state of negotiations. Statements at various points during negotiations by Domenic Gatto, the CEO of the largest Employer and the most frequent speaker among the Employers at negotiations, testified to by Cordiello, Gilberg, and four Local 1181 bargaining committee members, show that the Employers did not declare impasse because the dispute over the proposed MFN clause rendered further negotiations futile but to avoid paying the Easter adjustment, as well as the other elements of employee compensation the Employers unilaterally cut. See Tr. 105:21-23, 106:22 to 107:3, 292:19-22, 323:7-20, 324:24 to 326:10 (Cordiello) (at December 11 session, Gatto stated that by March bargaining will be over and he will give best and final offer); Tr. 139:13 to 140:3, 366:9 to 367:7 (Cordiello) (at March 5 session, Gatto stated Employers would not pay the Easter adjustment, the parties would be at impasse by then); Tr. 505:20-22, 507:7-13, 555:3 to 558:5 (Gilberg) (at February 26 session, Gatto stated he was giving the Union to March 5 and "that's it, you watch"); Tr. 933:18 to 935:17 (Jemmott) (at March 11 session, Gatto stated bargaining will be over by contract or best and final offer before March); Tr. 1614:20 to 1615:3 (Hedge) (at session before strike, Gatto stated all would be decided in March); Tr. 1628:15 to 1629:6, 1636:2-5

(Gigliotti) (at November session, Gatto stated bargaining has to be wrapped up by February or March); Tr. 1648:23 to 1649:13 (Catalano) (at session in end of November or beginning of December, Gatto stated bargaining will be over in March); see also Tr. 504:9-25 (Gilberg) (at November 20 session, Gatto stated that Local 1181 can see his books when he implements his last offer).

Although Gatto testified, he only denied making some of the statements attributed to him. See Tr. 1349:19 to 1350:3, 1350:19 to 1351:5, 1393:1-4. However, Gatto testified that he was not going to pay the Easter adjustment because he did not have the money. See Tr. 1351:4-5.

The Employers saved (and the employees collectively lost) $8-$10 million by not paying the Easter adjustment alone. See Tr. 193; Resps. Ex. 5 ¶33.

Moreover, the Employers agreed to several dates for bargaining sessions in March 2013, none after the due date of the Easter adjustment. See GC Ex. 13; Tr. 147.

These facts are powerful evidence that the proposed MFN clause was not important to the Employers and that, therefore, the Employers did not declare impasse because of the MFN clause issue.

D. The Proposed MFN Clause Was Not Critical to the Employers

The theme of the Employers' exceptions is that the ALJ erred by finding that the proposed MFN clause was not critical to the Employers and that the ALJ improperly excluded important evidence on the subject. The Employers' arguments are all without merit.

As an initial matter, to the extent the Employers rely on evidence that is not part of the record, for reasons previously submitted, Counsel for the General Counsel's motion to strike should be granted and the Employers' new facts and arguments based thereon should not be considered.

The Employers contend that the General Counsel admitted that the MFN clause was critical to the Employers. See Exceptions Br. at 2. But, as the Employers elsewhere concede, all that the General Counsel stated was that there is evidence that the MFN clause was a critical issue. See id. at 19. The great weight of the evidence and the more persuasive evidence is to the contrary.

Also, the ALJ's finding that the MFN clause was not critical to the Employers amounts to a credibility finding that should not be overturned. The ALJ did not credit the Employers' witnesses' testimony that the MFN clause was a critical issue. See ALJD at 21:28-29 (crediting testimony that Employers told Local 1181 representatives that the MFN clause "was not really that significant to them"). The Board's established policy is not to override an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. See Standard Dry Wall Products, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3rd Cir. 1951). In this case, there is no basis to reverse the ALJ's findings.

In any event, the ALJ correctly found that the MFN clause issue was not critical to the Employers. As explained above, among other things, (1) almost all the representatives of the individual Employers except two or three told Local 1181 prior to the declaration of impasse that the proposed MFN clause was not important to them, (2) the MFN clause was only one of many open issues at the time the Employers declared impasse, and (3) the Employers' counsel sent a letter in May 2012 identifying concessions the Employers would seek in negotiations, without mentioning the MFN clause although it was explicitly set to sunset at the expiration of the CBA.

In addition, the ALJ correctly reasoned that the MFN clause was not critical to the Employers because it would not help the Employers to make competitive bids. The ALJ found

not only that the MFN clause in the expired CBA was never invoked, but that the MFN clause, if continued, could not protect the Employers against low cost competitors that did not have collective bargaining agreements with Local 1181. See ALJD at 17:37-40; 20-21. As the ALJ stated:

> [T]he whole concept of what it would take to trigger the most favored nation's clause is completely speculative and is based on the unlikely event that Local 1181 would possibly consent to enter into a contract or contracts covering a relatively few number of employees that would automatically trigger a reduction in pay and/or benefits in agreements covering over 6,000 employees. I therefore believe the testimony that certain of the Respondents' principles [sic] told union representatives that the most favored nation's clause was not really that significant to them; that what they really wanted and needed in order to compete with the new comers, were substantial cutbacks in wages and benefits. To me, this makes a lot more sense and is, in my opinion, an example of comparing a single bird in the hand to the speculative benefit of having two birds in the bush.
>
> In my opinion, the Respondents' rationale for retaining the most favored nation's clause would not have addressed the issue that they assert they were worried about. And based on this conclusion, I find that the most favored nation's clause was not, from the Respondents' point of view, the crucial bargaining issue that they claimed was necessary in order for them to agree to a new contract.

ALJD at 21:24-38 (emphasis supplied).

Local 1181 attempts to organize unrepresented employees of bus companies. Assuming that Local 1181 is successful – organizing is notoriously difficult – a new employer may not be in a position to agree in a first agreement to the terms and conditions of employment that Local 1181 negotiated with established companies like the Employers that have bargained with Local 1181 for decades. For example, new companies may have one-time start-up costs. Thus, Local 1181 requires flexibility to secure first agreements with newly-organized companies.

The effect of the MFN clause is to deny Local 1181 this flexibility and discourage Local 1181 from organizing. See Tr. 349-350, 374-75. Local 1181 will not organize, for example, a new company performing DOE school bus work with, for example, 50 employees if, by agreeing

to lesser terms to secure a first agreement, Local 1181 will harm 8,000 existing Local 1181 members because an MFN clause requires Local 1181 to give the Employers the benefit of lesser terms Local 1181 negotiates with another company. In that situation, the new company's employees will remain unrepresented or be represented by a union that does not have Local 1181's bargaining power. In all likelihood, the new company's employees will have lesser terms and conditions of employment than Local 1181 could negotiate if Local 1181 were not constrained by the MFN clause.

Thus, the MFN clause is actually demonstrably contrary to the Employers' interests, except to the extent the Employers seek to weaken and ultimately destroy Local 1181. The Employers will be at a greater competitive disadvantage if Local 1181 can not organize and obtain decent contracts with the Employers' competitors and those companies' employees are instead unrepresented or represented by another union and are compensated below the industry standards Local 1181 has negotiated over decades. The companies that Local 1181 does not organize will be in an even better position to compete with the Employers.

The Employers proffer no credible reason for insisting on a provision that is not in their interest but that harms Local 1181. See Tr. 1518 (Strahl) (principal of Respondent Pioneer curiously asserts that he would prefer that a competitor operate non-union than operate under a Local 1181 agreement with lesser rates than those in Pioneer's agreement with Local 1181).

That the proposed MFN clause is not in the Employers' economic interests again shows that the Employers manufactured a phony impasse.

To attack the ALJ's finding, the Employers level a series of allegations and arguments, all of which are incorrect.

The Employers contend that the proposed MFN clause "offered protection against . . . new companies entering the industry, whose employees [Local 1181] already represented" and against "companies newly organized by Local 1181". See Exceptions Br. at 19. But the Employers do not contend that the proposed MFN clause would offer them protection against companies entering the industry that Local 1181 could not organize or companies entering the industry with which Local 1181 could not or would not enter a collective bargaining agreement. As to such companies, the ALJ was clearly correct that the MFN clause "would not have addressed the issue that [the Employers] assert they were worried about." ALJD at 21:35-36.

As to companies entering the industry whose employees Local 1181 already represented, as the ALJ explained, Local 1181 had no agreement with any company that permitted the MFN clause to be invoked. See ALJD at 20:33-21:2, 14-15. As to "companies newly organized by Local 1181," this necessarily refers to companies that win DOE K-12 contracts that Local 1181 subsequently successfully organizes. At the time of bidding, the MFN clause offers the Employers no protection against these companies because no one knows who they will be, much less whether Local 1181 will be able to organize their workers, much less whether Local 1181 will enter a collective bargaining agreement with those companies. To the extent the Employers imply that Local 1181's success in organizing those companies is assured and the Employers state that Local 1181 need not be concerned about lowering industry standards because Local 1181 can strike those companies if they do not agree to the same terms and conditions as the existing companies, see Exceptions Br. at 19, the Employers' position is sheer fantasy.

The Employers also contend that they needed the MFN clause for protection against each other. See id. This makes no sense in the context of the negotiations where all of the Employers were bargaining simultaneously for an identical contract. Indeed, this concern was not raised in

the Employers' post-hearing brief. Thus, this appears to be a *post hoc* rationalization rather than an explanation of why the MFN clause was critical to the Employers.

The Employers harp on the ALJ's statement that the circumstances in which the MFN clause would benefit the Employers were "very improbable". See Exceptions Br. at 19-20 (quoting ALJD at 21:16). The Employers do not dispute that the ALJ correctly identified the circumstances in which the proposed MFN clause could be triggered. Instead, the Employers contend that the ALJ wrongly assessed the likelihood that the proposed MFN clause would be triggered. But read in context, the ALJ's assessment was not as important to his finding as his crediting "the testimony that certain of the Respondents' principles [sic] told union representatives that the most favored nation's clause was not really significant to them; that what they really wanted and needed in order to compete with the new comers, were substantial cutbacks in wages and benefits." ALJD at 21:28-31. However probable or improbable were agreements that would trigger the proposed MFN clause, given the likelihood that new companies would win DOE K-12 contracts but would not be organized by Local 1181 or could not be compelled to accept the same contract terms as the Employers, substantial record evidence and logic support the ALJ's finding that the proposed MFN clause "was not really that significant" and wages and benefits were more important issues. See id.

Even assuming that the ALJ's assessment of the likelihood that the proposed MFN clause would be triggered was important to his conclusion, the ALJ's assessment was correct and the Employers fail to show that he erred.

The Employers contend that the ALJ precluded them from presenting facts that should have persuaded the ALJ that Local 1181 would enter agreements that would trigger the proposed MFN clause. Indeed, the Employers assert that they were precluded from presenting evidence

that would show that the circumstances in which the MFN clause would benefit the Employers that the ALJ deemed "very improbable" have "become reality". Exceptions Br. at 3, 23-24. In so arguing, the Employers misrepresent the ALJ's reasoning, facts in the record, and facts not included in the record that the Employers nonetheless attempt to have the Board consider with their Exceptions.

The Employers assert, first, that the ALJ improperly quashed subpoenas the Employers allegedly served on representatives of two "new" companies (GVC and VanTrans) "seeking testimony about the terms of any tentative or final agreements [those companies] had with Local 1181 for DOE K-12 work like the Employers performed." Exceptions Br. at 20. The ALJ never quashed the subpoenas because neither company filed a petition to revoke. See Tr. 680. However, the ALJ said that he would not direct representatives of the two companies to testify, but explained that he would not do so because Local 1181 provided the information the Employers sought. The Employers' counsel responded, "That's fair. That's a fair ruling." Tr. 1199 (emphasis supplied). Moreover, the Employers did not challenge the ALJ's rulings with respect to subpoenas in their post-hearing brief.

The ALJ directed Local 1181 to produce its collective bargaining agreements with GVC and VanTrans to the Employers. See ALJ Ex. 1; Tr. 681-82. Local 1181 produced its collective bargaining agreement with GVC, which does not cover DOE K-12 work, but instead only DOE Pre-K work. See Tr. 1134. The MFN clause does not apply to contracts covering Pre-K work. GC Ex. 2 at 46. Local 1181 does not have any agreement with VanTrans. At the ALJ's direction, Local 1181 produced its collective bargaining agreement with WE Transportation ("the WE CBA"), which again does not cover DOE K-12 work, but instead work on Long Island. Indeed, the WE CBA also states that its wage and benefit terms could not be applied if the

company at a future date performed school bus service in New York City. See ALJD at 20:36-21:2. Moreover, the WE CBA by its terms covers certain affiliates of WE, but not VanTrans. See Tr. 1198-99; Resps. Ex. 20.[17] Thus, neither the GVC nor the WE CBA apply to DOE K-12 work and neither would trigger the proposed MFN clause if it were adopted.

The Employers complain that the ALJ did not direct the production of tentative agreements, oral agreements, or conditional agreements, but those are not agreements at all. See Exceptions Br. at 20-21. Nor would any such "agreements" have triggered the proposed MFN clause. In any event, Local 1181 gave the Employers its collective bargaining agreements with two Pre-K companies that won bids (including GVC) and Cordiello testified that there were no such "agreements" or understandings with Long Island companies (such as WE). See Tr. 421-22, 1198. Moreover, the Employers again did not challenge the ALJ's rulings with respect to subpoenas in their post-hearing brief.

Thus, the ALJ did not preclude the Employers from presenting evidence about (non-existent) agreements between Local 1181 and new companies. Nor did the ALJ preclude the Employers from presenting evidence or argument about the likelihood that, in the presence of an MFN clause, Local 1181 would enter agreements with new companies that bid for and won DOE K-12 contracts and give such companies a better deal than the Employers. Compare Exceptions Br. at 21.

The Employers next contend - incorrectly and inappropriately based on material that should be struck from their submissions (a hiring flyer that is not contained in the record) - that "it is almost certain" that Local 1181 agreed to a package with VanTrans including lower wage rates and benefit levels. See Exceptions Br. at 21-22. In their preliminary statement, the

[17]Contrary to the Employers' allegations, see Exceptions Br. at 20 n.13, 32, there is no record evidence that Local 1181 represents any employees of VanTrans.

Employers allege that Local 1181 "has cut better deals with new companies (including, but not necessarily limited to, VanTrans – one of the companies the Employers had subpoenaed.)" Id. at 3. The Employers provide no evidence, whether in the record or in their inappropriate submissions to supplement the record, that Local 1181 agreed to allow Van Trans to implement various terms and conditions that would trigger the MFN clause or that Local 1181 cut a better deal with any company, including VanTrans. So far as the flyer reflects, the wages and benefits VanTrans pays are determined solely by VanTrans. See Pollack Aff. Ex. 2. Moreover, so far as the flyer reflects, the wages and benefits VanTrans pays were adopted after the hearing ended. See id. Thus, the Employers have no basis for their assertion that "[t]his evidence could not be introduced at trial because Judge Green quashed the subpoena served on VanTrans." Exceptions Br. at 22 n.15.[18]

The Employers build error upon error because, in criticizing the ALJ, the Employers omit the premise of the ALJ's sound reasoning: that it is very improbable that Local 1181 would enter a contract covering a relatively few number of employees that would automatically trigger a reduction in pay and/or benefits in agreements covering over 6,000 employees, i.e., if the MFN clause were retained in a new CBA. See ALJD at 21:25-28. If Local 1181 had entered an

[18]The Employers assert that the hiring rate offered by VanTrans is not higher than the hiring rate for "New Employees" in the CBA because of the EPPs. See Exceptions Br. at 22 n.14. The Employers are incorrect. When the Employers and, apparently, VanTrans hire workers who are new to the industry, they both pay their respective new hire rates. To the extent the Employers are bound by their contracts with the DOE to fill vacant positions by hiring employees who are not new to the industry but from "Master Seniority Lists" and to maintain those workers' wage rates while new companies may hire the same workers but are not required by their contracts with the DOE to maintain the workers' wage rates, the MFN clause is not implicated. The Employers also misstate the definition of a "New Employee" in the CBA. The CBA provides: "'New Employee' is an employee hired after May 20, 2010, but shall not include any employee whose industry seniority pre-dates such date and who follows the work after ratification." GC Ex. 2 at 2.

agreement with VanTrans as the Employers allege, that agreement would not have triggered a reduction in pay or benefits for any employees because there is no MFN clause in effect.

The Employers next contend – again incorrectly and inappropriately based on assertions that should be struck from their submissions because they are not supported by evidence in the record - that the second scenario that the ALJ identified that would trigger the proposed MFN clause "has now become a reality". Specifically, the Employers contend that Respondent Reliant, one of the largest Employers, decided that it would negotiate separately, that Local 1181 then announced that it would no longer bargain with the Employers as a group, and that each Employer will now seek an agreement that lowers its labor costs vis a vis the other Employers. See Exceptions Br. at 23-24. However, the ALJ's second improbable scenario was that, if the MFN clause were retained in a new CBA, Local 1181 would consent to a contract that gave an Employer lower labor costs than the other Employers. See ALJD at 21:20-23. The Employers provide no evidence, whether in the record or in their submissions to supplement the record, that through the time the Employers filed their brief, Local 1181 entered an agreement with any Employer, much less an agreement with an Employer with an MFN clause with other Employers in effect.

Indeed, the Employers concede that Reliant announced that it would negotiate on its own and that Local 1181 announced that it would bargain with each Employer individually shortly before the ALJ issued his decision (i.e., after the close of the record). See Exceptions Br. at 23. Accordingly, these new "facts" should be excluded and the ALJ did not exclude any facts that could have been presented at the hearing.[19]

[19]The Employers assert that Local 1181 insisted upon individual bargaining "to stretch out the period during which it enjoys the protection of the 10(j) injunction (improperly) issued by

E. The ALJ Correctly Relied on Statements by Employer Representatives

As explained above, among the evidence that supported the ALJ's correct finding that there was no impasse between the Employers and Local 1181 was the credited and almost entirely unrebutted testimony of Cordiello and other Local 1181 representatives "that certain of the Respondents' principles [sic] told union representatives that the most favored nation's clause was not really that significant to them; that what they really wanted and needed in order to compete with the new comers, were substantial cutbacks in wages and benefits." ALJD at 21:28-31.

In the Employers' Third Exception, the Employers contend that the ALJ "erred by applying the alleged statements of representatives of certain Respondents to other (unrelated) Respondents whose representatives are not alleged to have made similar statements, and then relying on such alleged statements to find that MFN was not critical to all the Respondents." Exceptions Br. at 25. For the additional reasons explained below, the Employers failed to meet their burden of establishing that the proposed MFN clause was critical and this Exception is also without merit.

A review of the bargaining history, placing the sparse discussions of the proposed MFN clause in context, demonstrates that the clause was not critical. The Employers presented evidence about the negotiations to show their purported united position. But the General Counsel and Local 1181 showed that the Employers' position at the negotiating table on the MFN clause was a façade because almost all Employers did not view the MFN clause as important. At the least, the evidence shows, and the ALJ correctly found, that the Employers did not meet their burden of showing that the proposed MFN clause was critical.

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the District Court . . ." Exceptions Br. at 23. The Employers make this false assertion without any basis in the record.

An improper attribution would exist if the ALJ found that a statement made by one person was the statement of a different person. The Employers appreciate this since they point out in a footnote that the ALJ made certain misidentifications of principals of Employers. See Exceptions Br. at 18 n.18. But this is not the Employers' complaint, nor did it affect the ALJ's analysis.[20]

Instead, the Employers' position appears to be that the ALJ could only have found the statements of individual Employers material to the position of those Employers, and not the entire Employer group. The Employers did not argue this previously. Accordingly, the argument is untimely and waived because a "contention raised for the first time in exceptions to the Board is ordinarily untimely and, thus, deemed waived." See Yorkaire, Inc., 297 NLRB 401, 401 (1989), enf'd, 922 F.2d 832 (3rd Cir. 1990); International Union of Operating Eng'rs. Local 513, 355 NLRB No. 25, slip op. at 1 (2010).[21]

Even if properly raised, the Employers' argument is meritless. The ALJ permissibly and properly found that statements by almost all Employers were material in determining whether the parties were at impasse and whether the proposed MFN clause was critical to the Employer group. The ALJ's point was not that any Employer spoke for another Employer. Instead, the ALJ's point was that the Employers' statements to Local 1181 representatives directly undermined the façade of a unified position on the proposed MFN clause the Employers

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[20]The Employers point out that the ALJ identified Joe Curcio as speaking for Empire State Escorts when he speaks for ANJ, Boro, and Lonero, and Joseph Termini as speaking for Gotham and Hoyt although he only speaks for Hoyt. The Employers also point out that Ray Fouche and Michael Tornabe represent more Employers than the ALJ identified. See Exceptions Br. at 26 n.18.

[21]See, e.g., Respondents Post-Hearing Brief at 28, where the Employers articulated many of the same arguments raised in their Exceptions Brief with respect to the Employers' statements made away from the bargaining table, but did not assert that statements by individual Employers could not be considered in assessing the position of the Employer group.

presented at the bargaining table and the Employers' current position that the MFN clause was critical. See ALJD 3:12-15. With the Employers presenting a single position on every proposal at the bargaining table, and with so many Employers expressing that the proposed MFN clause was not important away from the bargaining table, the ALJ could reasonably and properly conclude that the issue was not critical to the Employers and that the Employers might ultimately agree to a CBA without the proposed MFN clause or at least compromise.

In support of their Third Exception, the Employers make various arguments, see Exceptions Br. at 27-29, all of which are without merit.

The Employers wrongly assert that "at no point . . . did the Union say across the table anything to the effect of: 'wait a minute, why are you saying that you must have the MFN when somebody else told us that the MFN is not important.'" Exceptions Br. at 29. The Board should not be misled into believing that Local 1181 never brought this information to Pollack's attention. Although Cordiello did not do so "across the table," he did advise Pollack that the Employers were telling him that the MFN clause was not important. See Tr. 419.

As noted above, the ALJ found that the Employers' counsel's May 2012 letter "clearly represented the position" of the Employers, but "makes no reference to [an MFN clause]." See ALJD at 6:45-47. The Employers now contend that the ALJ incorrectly found that the letter was written on behalf of all Employers and that it was only written on behalf of the few Employers attorney Milman represents. However, the letter itself makes clear that, although signed by Milman, it was sent on behalf of both Milman's and Pollack's clients. See GC Ex. 3. Moreover, the Employers presented testimony that Milman prepared the letter with input from Pollack, after Pollack conferred with his clients as to the issues the Employers wanted in the letter. See Tr. 941-43. No Employer denied that the May 2012 letter represented its views. Thus, the ALJ

properly concluded that "the letter represented the position of the Respondent contractors . . ." See ALJD at 6:45-46.

The Employers seek to limit Cordiello's testimony, asserting that a number of Employers "did not state that the MFN was unimportant . . ." See Exceptions Br. at 26. But the Employers omit that Cordiello testified that "everyone except for two or three employers had told me . . . that they did not care about Most Favored Nations, they were willing to work out separate agreements." See Tr. 221:16-19 (emphasis supplied).

The Employers try to downplay that almost all Employers told Local 1181 that the proposed MFN clause is not important, but this effort fails. For example, that the Employers authorized Pollack to speak for all of them does not mean that any Employer could not speak for itself.

The Employers attempt to address some Employer representatives' statements that the MFN clause is not important by speculating as to the reasons the MFN clause is not important to those Employers. In so doing, the Employers miss the point. The Employers' position that the MFN clause was critical and caused an impasse is irreconcilable with the fact that the MFN clause is not important to almost all Employers. The reasons the MFN clause are not important to Employers do not matter for purposes of this issue. For example, the Employers' position is undermined by the fact that the MFN clause was not important to Hoyt (Termini) and All American, Rainbow, and Cifra (Fouche); this is so even if those Employers' reason was they were going out of business (although Hoyt bid for contracts commencing in 2014, see Tr.1595, see also Tr. 1386 (comment of the ALJ regarding Hoyt), and Fouche also represents Citywide, which is continuing in business, see Tr. 226). Similarly, the Employers' position is undermined by the fact that the MFN clause was not important to Bobby's, Grandpa's, Logan, and Lorissa

(Tornabe) even if those Employers' reason was their related companies employ workers Local 1181 does not represent at lower compensation levels. In any event, the Employers have not addressed the statements of all the Employers Cordiello and the other Local 1181 representatives specifically identified, much less the statements of all the Employers except two or three. Cordiello testified that all the Employers except two or three told him that the proposed MFN clause was not important to them. See supra pp. 22-23.

The Employers' assertion that most of the Employer representatives' statements away from the bargaining table "occurred some five (5) months before the declaration of impasse," see Exceptions Br. at 27, is simply false. The Employers made the statements over the course of months, not simply at the beginning of negotiations. See, e.g., Tr. 1613 (February), 1647 (January), 1635 (December/January).

All statements by Employer representatives that the proposed MFN clause is not important to their companies were made at a time when the Employers purportedly were concerned about the DOE bidding out contracts without the EPPs. Mayor Bloomberg announced the bids in December 2012 and, according to Gatto, the Employers were concerned about the DOE bidding their contracts since 2009. See Tr. 1314, 1317; GC Ex. 3 (May 2012 letter discusses Employers' need for concessions because contracts would be bid).

The Employers assert that "even if Adem Adem (a General Manager of the parent company of Reliant Transportation Inc) made such a comment as alleged by Mr. Cordiello, Mr. Pate (the C.E.O. of Reliant Transportation Inc.'s parent company) is Mr. Adem's superior, so it is Mr. Pate's view on the MFN that counts." Exceptions Br. at 27 n.21. Adem attended negotiations as a Vice President of MV Transportation (Reliant). See Tr. 994, 1073. Thus, he was an authorized representative of Reliant and his statement "counts". In any event, Pate also

told Cordiello that the MFN clause was not important. See Tr. 221:14-19, 222:8-12, 410:20 to 411:22.

The Employers contend that the testimony of several witnesses was "unrefuted" and established that the MFN clause was critical for some companies. See Exceptions Br. at 27-28. This assertion is fatally flawed. Assuming that there was "unrefuted" testimony by Strahl (Pioneer) that he stated in negotiations that he would never agree to a CBA without the MFN clause and by Gatto (Amboy, Atlantic Queens, and Atlantic Escorts) that he stated the MFN clause had to be in place, such testimony about what was said in negotiations does not satisfy the Employers' burden of establishing that the MFN clause was critical, even for those companies.[22] The ALJ correctly found that the MFN clause was not a critical issue after assessing all the relevant evidence and the totality of the circumstances.

In sum, the record evidence demonstrates that the Employers failed to meet their burden of establishing that the proposed MFN clause was a critical issue in negotiations.

F. The Employers' Remaining Arguments are all Without Merit

1. As noted above, the Employers err in their exclusive focus on the MFN clause issue. By focusing on a single issue, the Employers can not meet their heavy burden of showing that the parties were at an overall impasse even if one accepts their position that the parties were deadlocked on the MFN clause (they were not). The existence of a deadlock on the MFN clause would not, in itself, mean that there was no agreement to be had.

2. For the same reason, the Employers err when they ignore the progress on issues besides the MFN clause, including on the day the Employers declared impasse, and delay by the

[22]The Employers assert in their brief that Pate (Reliant) testified that the MFN clause was "survivability" but do not assert that Pate said this during negotiations. See Exceptions Br. at 27. The Employers also cite the ALJ's attribution of a statement concerning the MFN clause by Rossi (RPM and Mountainside) but Rossi did not testify; it appears that this statement is properly attributed to Pollack. See Tr. 1211-12.

Employers in producing select financial records and other information to Local 1181. The Employers' position with respect to the progress the parties were making is summarized in a single phrase in a footnote: "progress on other issues does not negate impasse." Exceptions Br. at 14 n.11. But the parties' progress and the Employers' delay in producing information are compelling evidence that the parties were not at an overall impasse and that the MFN clause issue did not cause a breakdown in the overall negotiations. Even if Local 1181 requested information that was not directly related to the MFN clause, movement on various open issues and the promise of more movement once Local 1181 had time to incorporate information received from the Employers into its bargaining positions shows that the parties were not even near the end of their ropes, much less at an overall impasse. See Harbor View Health Care Ctr., No. 22-CA-28151, at 46 ("Respondent is incorrect in its apparent assumption that it must be shown that the information [requested] would have changed the course of bargaining."). Both sides had many more cards yet to play to advance the negotiations given the number of open issues. There was good reason to continue bargaining and to believe that the parties would find their way to a mutually-agreeable overall compromise, including with the assistance of a mediator as had helped the parties in the past.

3. The Employers' assertion that the Board can rely on post-declaration of impasse evidence to find that an impasse existed is contrary to Board law. See Exceptions Br. at 24. The burden of showing that an impasse existed rests with the Employers. See supra p. 10. By arguing that the Board may find that the parties were at an impasse because Local 1181 did not change its position on the MFN clause after the Employers declared impasse and walked away from the bargaining table (see Exceptions Br. at 19-24), the Employers attempt to shift the burden of proof and ask Local 1181 to bargain against itself. See Teamsters Local 639 v. NLRB,

924 F.2d 1078, 1084 n.6 (D.C. Cir. 1991) ("Board may not premise its impasse finding on events occurring after the declaration of impasse"); Francis J. Fisher, Inc., 289 NLRB 815, 815 n.1 (1987) (impasse may not be found "on the basis of subsequent events"). The Employers' citation to a single circuit court decision for the proposition that the Board cannot rely on post-impasse conduct to find no impasse does not support the Employers' position that the Board may rely on post-impasse conduct to find that an impasse existed.

4. The Employers assert that there was never any sign of possible compromise on either side's position regarding the MFN clause. See, e.g., Exceptions Br. at 8. This assertion – which again says nothing as to the existence of an overall impasse – is incorrect. As set forth above, Local 1181 offered to extend the CBA and made explicit that this would include the MFN clause. At the January 8, 2013 session, Cordiello suggested an "alternative" to the MFN clause. Cordiello's suggestion further shows that the Employers fabricate Local 1181's allegedly intransigent position on the MFN clause. Also, on February 20, 2013, Local 1181 and Reliant agreed to an MFN clause relating to Welfare and Pension Plan contributions. See supra p. 21.

5. The Employers incorrectly assert that Local 1181's repeatedly and consistently expressed position was that it would "never" or "absolutely not" agree to the MFN clause. But repeating this falsehood (among others) over and over does not make it true. No matter how much the Employers attempt to torture the testimony and bargaining notes, the Employers can not make the record confess that Local 1181 repeatedly or consistently expressed such a position. Setting aside Local 1181's offers to extend the CBA with the MFN clause and January 8, 2013 suggestion of an "alternative" to the MFN clause, on our review of the record, Local 1181 made no statement on the issue more forceful than "no" or "reject" prior to, at the earliest, February 26. See Tr. 349. Cordiello recalls saying "never" in reference to the MFN clause once (see id.);

Gilberg concurs with Cordiello (see Tr. 550-51); Pate recalls one incident prior to distribution of the BFO (see Tr. 1028-29); and Pollack testified that he recalls two incidents prior to distribution of the BFO (see Tr. 1184-85, 1221). However, Pollack stated that he did not have independent recollection of the events of bargaining sessions prior to March 19, 2013 but relied on his notes (which do not support his testimony on this issue). See Tr. 955, 1219; Resps. Ex. 17. Strahl inexplicably testified, although he was surreptitiously taping the negotiations, that he heard Cordiello say he would never agree on "numerous occasions." Tr. 1456. Repeated citations to the same one or two incidents do not increase the number of times Local 1181 stated a position more forceful than "no".

If the MFN clause was a central issue for the Employers, the Employers do not explain why they waited until March 19 to declare an impasse. The Employers do not identify what changed, other than the parties were making progress on other (more important) issues and the date for payment of the Easter adjustment was approaching.

Ultimately, and as developed in Point I(C), the record evidence shows that the Employers did not genuinely believe that there was an overall impasse, but that they hoped that Cordiello's alleged statements would serve as grounds to defend declaring impasse and implementing their BFO prior to the due date of the Easter adjustment. The Employers knew that the parties were making progress in the few post-strike sessions, that Local 1181 modified its positions on proposals it had rejected, that Cordiello indicated a willingness to continue to move towards the Employers' positions on the day the Employers declared impasse, see Tr. 180-83, 527, that Local 1181 agreed to the MFN clause in the prior negotiations, and that the prior negotiations ran for more than 20 bargaining sessions and involved a mediator, see Tr. 89-90, 577-78. Surely the Employers knew there was the possibility of ultimate compromise. See Detroit Newspaper

Printing & Graphic Comm'ns Union v. NLRB, 598 F.2d 267, 273 (D.C. Cir. 1979) ("Parties commonly change their position during the course of bargaining notwithstanding the adamance with which they refuse to accede at the outset. . . . [C]ompromises are usually made cautiously and late in the process."); Harbor View Health Care Ctr., No. 22-CA-28151, at 45 ("The Board has recognized that a bargaining stance where both sides merely maintain hard positions and each indicates to the other that it is standing pat is the rule in bargaining and not the exception. . . . [T]he very nature of collective bargaining presumes that while movement may be slow on some issues, a full discussion of other issues may result in agreement on stalled ones").

For these reasons, the Employers unlawfully declared impasse and implemented their BFO.

CONCLUSION

For the foregoing reasons, the Employers' Exceptions are without merit and the Board should affirm the ALJ's Decision holding that the Employers violated the Act as alleged in the Consolidated Complaint.

Dated: December 6, 2013

Respectfully submitted,

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Exhibit A

Rollover CBA till next year and see what bids do

Adem Adem - can't survive — we'll open our books,

include most Favored nations? yes

Resp-12 - 006

1181 Contractor Negotiations 11/20/12

① Jeff tells union contractors are committed for concessions + strike with Wip-saw agreement
② Mike responds that our demands are more like 40% and that we are miles apart
③ Rich brings up that we need to redefine the playing field - with light at end of tunnel [redacted] over years. This is about mutual survival.
④ Mike will not bring give backs to membership.
⑤ Mike [redacted] suggests to roll over the labor contract for one more year, wait and see.
⑥ Rich asks about favored nations clause. Does it roll over too? Mike said yes. Dom said he is not rolling over existing contract.
⑦ We will counter next meeting.
⑧ Mike announced February week 2/20, 21, 22 is not a double day since we paid week of closure during Sandy.

2/5 or add to meeting at SI Hilton

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Answering Brief of Local 1181-1061, Amalgamated Transit Union, AFL-CIO to Respondents' Exceptions to the Decision of the ALJ, to be filed electronically via the NLRB's e-filing system. I further certify that I caused copies of the Exceptions to be served by e-mail upon:

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this 6th day of December, 2013.

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